

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: BAIR HUGGER FORCED AIR
WARMING DEVICES PRODUCTS
LIABILITY LITIGATION

MDL No. 15-2666 (JNE/FLN)

This Document Relates To:

Hager, 0:16-cv-00136-JNE-FLN

Weimer, 0:16-cv-00621-JNE-FLN

Fraley, 0:16-cv-02755-JNE-FLN

Alford, 0:16-cv-02757-JNE-FLN

Wilburn, 0:16-cv-02772-JNE-FLN

Johnson, 0:16-cv-02803-JNE-FLN

Garro, 0:16-cv-02874-JNE-FLN

Toler, 0:16-cv-02896-JNE-FLN

DePriest, 0:16-cv-03383-JNE-FLN

Barrett, 0:16-cv-03553-JNE-FLN

Fling, 0:16-cv-03781-JNE-FLN

**REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR
FAILURE TO COMPLY WITH PRETRIAL ORDER NO. 14**

Defendants brought this motion to dismiss pursuant to the Court's Pretrial Order No. 14 ("PTO 14") after the plaintiffs below failed to serve Defendants with the required Plaintiff Fact Sheet ("PFS"), and plaintiffs' cases were placed on the Court's agenda for two sequential status conferences:

Case Number	Plaintiff	Case Filed	PFS Due	Firm Name
0:16-cv-00136-JNE-FLN	Hager	1/21/2016	12/26/2016	Meshbeshier & Spence, Ltd.
0:16-cv-00621-JNE-FLN	Weimer	3/10/2016	1/27/2017 (by agreement)	Lockridge, Grindal, Nauen, PLLP

0:16-cv-02755-JNE-FLN	Fraley	8/16/2016	12/26/2016	Bernstein Liebhard, LLP
0:16-cv-02757-JNE-FLN	Alford	8/16/2016	12/26/2016	Bernstein Liebhard, LLP
0:16-cv-02772-JNE-FLN	Wilburn	8/18/2016	12/26/2016	Bernstein Liebhard, LLP
0:16-cv-02803-JNE-FLN	Johnson	8/19/2016	12/26/2016	Bachus & Schanker, LLC
0:16-cv-02874-JNE-FLN	Garro	8/25/2016	12/26/2016	Bernstein Liebhard, LLP
0:16-cv-02896-JNE-FLN	Toler	8/26/2016	12/26/2016	Bachus & Schanker, LLC
0:16-cv-03383-JNE-FLN	DePriest	10/6/2016	1/4/2017	Bernstein Liebhard, LLP
0:16-cv-03553-JNE-FLN	Barrett	10/18/2016	1/16/2017	Gustafson Gluek PLLC
0:16-cv-03781-JNE-FLN	Fling	10/31/2016	1/29/2017	Bachus & Schanker, LLC

Plaintiffs Hager (16-cv-00136), Weimer (16-cv-02755), Johnson (16-cv-02874), Toler (16-cv-03383), Barrett (16-cv-03781), and Fling (16-cv-03553) have filed no response to Defendants' motion to dismiss. Accordingly, the Court should grant Defendants' motion to dismiss these plaintiffs as unopposed.¹

¹ Plaintiffs Johnson and Weimer served PFSs on May 11, 2017 and June 1, 2017, respectively – after Defendants filed their motions to dismiss, and six months and four months after their respective deadlines. No excuse has been provided for this extreme delay (indeed, Defendants had even granted a one-month extension to Weimer, to no avail), and the Court should not countenance the flouting of PTO 14. Otherwise what incentive would any plaintiff have to comply?

In addition, stipulations of dismissal have now been filed for Plaintiffs Alford (16-cv-02772) and Garro (16-cv-02896), so those cases are no longer at issue in this motion.

The only plaintiffs opposed Defendants' motion are Fraley (16-cv-02757), Wilburn (16-cv-02803), and DePriest (16-cv-03553). Their counsel outlines his failed efforts over the course of several months to procure a PFS from these clients, and then requests a nearly four (4) month extension within which to comply with PTO 14 (or alternatively, dismissal without prejudice for these cases). Those difficulties were never raised with Defendants' counsel, and in any event, they are no excuse. These plaintiffs chose to sue Defendants, and in so doing, they accepted the obligations imposed upon them by PTO 14 and the Court's rules. Dismissal of these cases with prejudice is the appropriate course. If the Court grants more time to these plaintiffs, then it will remove any incentive for *any* plaintiff to comply with PTO 14 until the Defendants have listed their case twice and filed a motion to dismiss. This would be deeply unfair not only to Defendants but also to those plaintiffs who have complied with PTO 14's deadlines.

The Court's authority to dismiss these cases with prejudice is beyond question. A court may dismiss an action with prejudice under Rule 41(b) if a plaintiff "fails to prosecute or to comply with [the Federal Rules] or a court order." Fed. R. Civ. P. 41(b). Under Rule 41(b), bad faith is not required to warrant dismissal. *Williams v. U.S. Bank Nat. Ass'n*, No. 12-cv-1247 (DSD/JJK), 2013 WL 4050749, at *1–2 (D. Minn. Aug. 9, 2013), *citing Doe v. Cassel*, 403 F.3d 986, 990 (8th Cir. 2005) (*per curiam*). Rather, a party must only have "acted intentionally as opposed to accidentally or involuntarily." *Id.* A party's failure to follow a court order despite "a warning from the district court that [she] is skating on the

thin ice of dismissal” is evidence of intentionality. *Id.* (citing *Rodgers v. Curators of Univ. of Mo.*, 135 F.3d 1216, 1221 (8th Cir. 1998)).

These plaintiffs were undoubtedly warned. The deadlines and requirements of PTO 14 were clear and posted on the Court’s website. PTO 14 states that, should a case appear on the agenda for two sequential status conferences, “Defendants may make a motion for dismissal for failure to comply with this Court’s Pretrial Order as to the allegedly delinquent party.” PTO 14, ¶ 8. These plaintiffs were twice listed on sequential status conference agendas. Accordingly, under Rule 41(b) the Court should dismiss these plaintiffs’ cases with prejudice.

For these reasons, Defendants respectfully request that the Court dismiss with prejudice the following cases: Hager (16-cv-00136), Weimer (16-cv-02755), Johnson (16-cv-02874), Toler (16-cv-03383), Barrett (16-cv-03781), Fling (16-cv-03553), Fraley (16-cv-02757), Wilburn (16-cv-02803), and DePriest (16-cv-03553).

Dated: June 9, 2017

Respectfully submitted,

s/ Benjamin W. Hulse

Jerry W. Blackwell (MN #186867)

Benjamin W. Hulse (MN #0390952)

BLACKWELL BURKE P.A.

431 South Seventh Street

Suite 2500

Minneapolis, MN 55415

Phone: (612) 343-3256

Fax: (612) 343-3205

Email: blackwell@blackwellburke.com

bhulse@blackwellburke.com

Bridget M. Ahmann (MN #016611x)

FAEGRE BAKER DANIELS LLP

2200 Wells Fargo Center

90 South Seventh Street

Minneapolis, MN 55402

Phone: (612) 766-7000

Email: bridget.ahmann@faegrebd.com

**Counsel for Defendants 3M Company
and Arizant Healthcare, Inc.**